SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, ~~1948~~ 1947

No. ~~404~~ 12 12

ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY, ET AL.,

Appellants,

vs.

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 46-729

ARTHUR OSMAN, DAVID LIVINGSTON, JACK PALEY, SHIRLEY MOSHINSKY, AND WHOLESALE AND WAREHOUSE WORKERS UNION, LOCAL 65, AN UNINCORPORATED ASSOCIATION OF MORE THAN SEVEN PERSONS,

Plaintiffs,

against

CHARLES T. DOUDS, INDIVIDUALLY AND AS REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD,

Defendant

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Arthur Osman, David Livingston, Jack Paley, Shirley Moshinsky, and Wholesale and Warehouse Workers Union, Local 65 (hereinafter referred to as Local 65), plaintiffs in the above entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the order of the District Court.

This is an action brought by plaintiffs in the District Court of the United States for the Southern District of New

York to enjoin the defendant who is Regional Director of the National Labor Relations Board for the Second Region, from enforcing the provisions of Section 9(h) of the National Labor Relations Act, as amended, Title 29 U. S. C. Section 159(h), 61 Stat. 143; from conducting an election of employee representatives without placing the name of plaintiff Local 65 on the ballot, and from giving effect to a consent election agreement entered into over the protest and without the consent of plaintiff Local 65.

A three-judge statutory court was convened, pursuant to the provisions of Section 380a of Title 28 U. S. C.; 50 Stat. 751. That statutory court on October 20, 1948, entered an order dismissing the complaint on the merits and denying plaintiffs' motion for an interlocutory injunction, holding that the provisions of the statute challenged were invalid and not repugnant to the Constitution.

A. Statutory Provisions on Which Jurisdiction Rests

At the time this action was commenced and at the time the three-judge statutory court was convened as aforesaid, plaintiff was proceeding under the provisions of Section 380a of Title 28 of the United States Code. After the commencement of the action, but prior to the entry of an order, said section was superseded by the provisions of Sections 2282, 1253 and 2101 of the Act of June 25, 1948, which constituted a general revision of the Judicial Code. Those sections read as follows:

> Section 2282. *Injunction against enforcement of Federal statute; three-judge court required.*
>
> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard

and determined by a district court of three judges under section 2284 of this title.

Section 1253. *Direct appeals from decisions of three-judge courts.*

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

Section 2101. *Supreme Court; time for appeal or certiorari; docketing; stay.*

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

B. The Statute of the United States Involved in the Action

The validity of Section 9(h) of the National Labor Relations Act, as amended, 29 U. S. C. 159(h), 61 Stat. 143, is challenged in this action on the ground that said section is repugnant to the Constitution of the United States. This provision reads as follows:

"9(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month

period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

C. Date of Judgment or Decree Sought to Be Reviewed and Date of Petition for Appeal

The date of the judgment and order of the District Court here sought to be reviewed is October 20, 1948.

The petition for allowance of appeal was presented on October 21, 1948.

D. Substantial Nature of the Question Presented

This is an action instituted by Local 65, an unincorporated labor organization, Arthur Osman, president of Local 65, David Livingston, its vice-president, Jack Paley, its secretary-treasurer, and Shirley Moshinsky, a member. The suit was brought to restrain the Board from giving force and effect to Section 9(h) of the National Labor Relations Act, as amended, on the ground that this provision is repugnant to the Constitution of the United States in that it constitutes an impairment of the right of free speech and free assembly and is an infringement upon the rights of the plaintiffs and the other officers and members of the plaintiff labor organization to associate and join together for their common and lawful purposes, and that said section deprives the plaintiffs of liberty without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments. The section is further attacked on the ground that it is

vague, indefinite and uncertain in violation of the Fifth Amendment, and on the further ground that it constitutes a bill of attainder in violation of Article 1, Section 9, of the Constitution.

This action and a companion action which has similarly been appealed (*American Communications Association* v. *Douds*, now on the docket of the United States Supreme Court, October Term, 1948 No. 336), are the first attacks in the Southern District of New York upon the validity of the requirements of the Taft-Hartley Act that labor organizations file the so-called "non-Communist affidavits" in order to be eligible to participate in proceedings before the National Labor Relations Board. A decision by the Supreme Court on the validity of these provisions is awaited by a substantial number of labor organizations, both national and local. Only a decision by the Supreme Court can put at rest the many doubts and uncertainties which now prevail throughout the labor movement and which have caused numerous instances of industrial unrest.

This is not the first case before the Supreme Court in which this issue was raised. In *National Maritime Union* v. *Herzog*, Civil Action No. 4874-47, a proceeding was brought in the United States District Court for the District of Columbia to challenge the constitutionality of Sections 9(f), (g) and (h) of the Act, that union having failed to comply with any of those provisions. The Supreme Court held that Sections 9(f) and (g) were constitutional and expressly refrained from passing on the constitutionality of Section 9(h).

We do not believe that any serious contention will be made by the defendant that a substantial constitutional question is not herewith presented. As a matter of fact, in *National Maritime Union* v. *Herzog*, the Solicitor General of the United States in filing a statement against the juris-

diction of the Supreme Court said: "The Board agrees with the appellant that the questions relating to the constitutionality of 9(h), the affidavit provision, are substantial in character and present issues of great public importance in the administration of the Act. The Board believes it to be in public interest that there be an early final determination of the constitutionality of this paragraph."

Moreover, in *American Communications Association* v. *Douds*, referred to above, the defendant interposed no objections to the jurisdiction of the Court. Although the record in this case differs somewhat from that in *American Communications* v. *Douds*, we do not believe that any of those differences go to the issue of jurisdiction.

The present case, like the companion action, stems from a petition for certification of representations filed by a rival labor organization. Local 65 sought to intervene in the proceedings. The National Labor Relations Board refused to permit such intervention on the ground that Local 65 had not complied with the provisions of Section 9(h). The Board proceeded to recognize a consent election agreement entered into between a rival labor organization and the employer without the consent and over the objection of Local 65.

The questions presented include the following:

(1) Whether the provisions of Section 9(h) abridge the rights of freedom of speech, press and assembly guaranteed to each of the plaintiffs by the First and Fifth Amendment to the Constitution.

(2) Whether the provisions of Section 9(h) constitute a bill of attainder in violation of Article 1, Section 9 of the Constitution.

(3) Whether the provisions of Section 9(h) are repugnant to the Constitution in that they are vague and indefinite in conflict with the requirements of the Fifth Amendment.

1. Section 9(h) abridges the rights of freedom of speech, press and assembly guaranteed to each one of the plaintiffs by the First Amendment to the Constitution.

Labor organizations and their members both are entitled to the exercise of the basic rights provided in the First Amendment to the Constitution. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Thomas* v. *Collins*, 323 U. S. 516, *NLRB* v. *Jones & Laughlin*, 301 U. S. 1, 33, 34; *Texas & N. O. R. Co.* v. *Brotherhood*, 281 U. S. 548, 570; *Virginia Railway* v. *System Federation*, 300 U. S. 515, 543.

The complaint clearly indicates the manner in which these rights are denied to the plaintiff organization and its members. By denying to Local 65 the opportunity to participate in election proceedings while affording those opportunities to rival labor organizations, the basic rights guaranteed by the Constitution are impaired. If a rival labor organization is certified as a result of a proceeding in which Local 65 is denied an opportunity to participate, Local 65 is by the statute under consideration denied the right to strike (Section 8(b)(4)(C); Section 303(3); or to obtain the assistance of other labor organizations in its dispute with an employer (Section 8(b)(4)(B); Section 303(2)). The statutory scheme in establishing a rival labor organization as the exclusive bargaining agency while denying to the plaintiffs the opportunity to qualify as such agency because of the political beliefs of the officers of the union results in an effective denial of the basic constitutional right to function and operate as a trade union.

The placing of the conditions contained in Section 9(h) upon the exercise of these basic rights constitute a burden upon their exercise. Congress cannot forbid the enjoyment of a constitutional right nor can it burden or impair such right by indirection. *Thomas* v. *Collins*, 323 U. S. 516; *West Virginia* v. *Barnette*, 319 U. S. 624; *Lovell* v. *Griffin*,